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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 309

AKTIEBOLAGET SEPARATOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Board of Tax Appeals (R. 19–33) are reported in 45 B. T. A. 243. The *per curiam* opinion of the Circuit Court of Appeals (R. 136) is reported in 128 F. (2d) 739.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1942 (R. 136–137). The petition for a writ of certiorari was filed August 17, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer, a Swedish corporation, had an office in the United States within the meaning of section 231 of the Revenue Act of 1936 and is therefore taxable as a resident foreign corporation under subsection (b), or whether it is taxable as a nonresident foreign corporation under subsection (a).

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 231. TAX ON FOREIGN CORPORATIONS.
>
> (a) *Nonresident Corporations.*—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, except that in the case of dividends the rate shall be 10 per centum, and except that in the case of corporations organized under the laws of a contiguous country such rate of 10 per centum with respect to dividends shall be

reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country.

(b) *Resident Corporations.*—A foreign corporation engaged in trade or business within the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a), but the normal tax imposed by section 13 shall be at the rate of 22 per centum instead of at the rates provided in such section.

* * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 231–1. *Taxation of foreign corporations.*—

* * * * *

(b) *Resident foreign corporations.*—

* * *

Whether a foreign corporation has an "office or place of business" within the United States depends upon the facts in a particular case. The term "office or place of business," however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

* * * * *

STATEMENT

The findings of the Board of Tax Appeals (R. 19–26) may be summarized as follows:

Petitioner corporation was organized in 1883 under the laws of the Kingdom of Sweden; it is engaged in the manufacture of centrifugal machines, having interests in Europe and elsewhere, and has at all times maintained its principal office in Stockholm, Sweden. It was not during the tax year 1936 engaged in trade or business within the United States, and none of its officers were located in the United States during that period (R. 19). In 1936 petitioner's entire income from American sources consisted of dividends on stock which it owned in two New Jersey corporations, De Laval Separator Company and De Laval Steam Turbine Company;[1] the former had its principal office at 165 Broadway, New York, N. Y.; the latter had an executive office at the same address, but maintained its principal place of business in Trenton, New Jersey.

The De Laval companies' offices at 165 Broadway have been maintained since 1907 on the fifteenth floor of the building, under a lease held by the Separator company. F. J. Arend has been president of both companies; before, during, and

[1] Petitioner owned approximately 85 percent of the Separator company's stock, on which it received a dividend of $531,093.75 December 18, 1936; on December 21, 1936, petitioner received a dividend of $162,880 from the Turbine company (R. 20).

since the tax year he has employed Agnes Cheney as a private secretary, who has received for her services a salary of approximately $3,600 a year. While so employed she has occupied room 1521, part of the leased premises[2] (R. 20). On October 23, 1936, the Separator company sublet room 1521 to petitioner at an annual rental of $500; the sublease was subject to the principal lease, was terminable by the Separator company on 30 days' notice, and was subject to a reserved right in Separator to use the office for its own purposes to the extent that such use would not interfere with the occupation of petitioner. By letters of the same date petitioner employed Miss Cheney at a monthly salary of $25 to perform certain functions in addition to her duties with the De Laval companies; she was directed: to receive all dividend checks from American corporations and deposit them in an account to be opened by petitioner with the Marine Midland Trust Company of New York, and cable petitioner on receipt of any dividends; to keep a record of dividends received and bank deposits and withdrawals, submitting to petitioner a monthly report of entries; to receive mail and other communications addressed to petitioner and forward these to Stockholm; to procure office supplies, including stationery; to cause a notice of petitioner's name to be

[2] The office adjoined Arend's, and was equipped with the usual office furniture (R. 20; 76).

placed on the door to room 1521 and on the bulletin boards of the building; to obtain necessary tax returns, complete them, transmit them to Stockholm for verification and signature, and file them on their return (R. 21). She was authorized to sign petitioner's checks on an account to be opened with the Chemical Bank and Trust Company of New York, to pay the expenses of petitioner's New York office, including her own salary, but she was not authorized to sign checks drawn on the Marine Midland Trust Company.[3] In a letter dated December 22, 1936, petitioner directed Miss Cheney, until further notice, to remit to its Stockholm office by cable 90 percent of all dividends received from the De Laval companies, depositing 10 percent in the Marine Midland Trust Company (R. 22).

Since November 1, 1936, Miss Cheney's duties for petitioner have consisted of performing the activities directed and authorized (summarized in the preceding paragraph) (R. 22; see R. 23–24). She attended the office regularly, and used the same desk and typewriter in room 1521 for her employment by petitioner as she used for the duties with the De Laval companies (R. 24). By letters from Stockholm, dated November 12, 1936, petitioner's managing director advised both companies that petitioner had opened an office in New

[3] Arend was authorized to sign checks drawn on both banks. The two bank accounts of petitioner were opened in November or December 1936 (R. 22).

York, and instructed them to deliver dividends to it at that office. The De Laval companies forwarded these letters to the Commissioner of Internal Revenue, advising him that they would thereafter pay dividends to petitioner in New York, without withholding any tax.[4] The Deputy Commissioner on December 9, 1936, advised the two companies that they were relieved of liability to withhold tax from dividends paid after July 1, 1936 (R. 25). The De Laval companies did not withhold any federal income taxes on the dividends which they paid to petitioner in December 1936; these were paid entirely to petitioner at room 1521 and were deposited with the Marine Midland Trust Company (R. 25–26).

Miss Cheney, with the assistance of counsel and of the auditor for the De Laval companies, prepared petitioner's federal income-tax return for 1936; this was subsequently filed with a collector[5] (R. 24). The Commissioner determined a deficiency in tax on the basis that petitioner was tax-

[4] The withholding procedure was applicable in the case of nonresident foreign corporations under section 231 (a). Section 144 of the Revenue Act of 1936.

[5] Miss Cheney also prepared for petitioner a capital-stock tax return for the year ending June 30, 1937. Exemption from tax was claimed and was allowed by the Deputy Commissioner on May 21, 1938, because the evidence presented by petitioner disclosed that it "was not doing business in the United States" (R. 24–25). Section 105 (b) of the Revenue Act of 1935, as amended by section 401 of the Revenue Act of 1936.

able as a nonresident foreign corporation rather than as a resident foreign corporation[6] (R. 19). The Board of Tax Appeals sustained the Commissioner, three members dissenting (R. 26, 30, 34). The Circuit Court of Appeals affirmed *per curiam* on the authority of its decision in *Linen Thread Co.* v. *Commissioner,* 128 F. (2d) 166.

ARGUMENT

Section 231 (b) of the Revenue Act of 1936 defines a resident foreign corporation as one "engaged in trade or business within the United States or having an office or place of business therein." Petitioner does not contend that it was engaged in trade or business within the United States during 1936 (see Pet. 14–16; cf. Statement, *supra,* page 7, note 5), but it contends that it had an office or place of business in this country during the tax year. Admittedly the asserted "office" in room 1521 at 165 Broadway, New York, was not used or kept for the transaction of any of petitioner's regular business (see Pet. 16, 17, 19).[7]

[6] In the case of the former, not only was the tax to be withheld (section 144), but it was imposed on gross income (section 231 (a)); in the case of the latter the tax was payable by the taxpayer and was levied on net income, after allowable deductions (section 231 (b); see Pet. Ex. 29, R. 124).

[7] The letter of October 23, 1936, containing petitioner's instructions to Miss Cheney concerning the duties of her employment by petitioner (see Statement, *supra,* page 5) specifically stated that she was not authorized to engage in any activities on behalf of the corporation except the limited

The applicable regulations provide that the term "office or place of business" implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be or are effected. Regulations 94, Art. 231–1 (b). Clearly petitioner did not in 1936 maintain an office or place of business within their meaning. The regulations have been continued for later years in which there has been no change in the statutory definition. Regulations 101, Art. 231–1 (b); Regulations 103, Sec. 19.231–1 (b). Accordingly, substantial weight is properly given to the administrative interpretation of the tax statute. *Taft* v. *Commissioner*, 304 U. S. 351; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459. In any event the regulations are reasonable and therefore should control. Cf. *Magruder* v. *Washington, B. & A. Realty Corp.*, 316 U. S. 69; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375; see *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, 134.

Petitioner attacks the regulations (Pet. 23–24), contending that they do violence to the statute by

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activities described in the letter (see pages 5–6, *supra*) (Pet. Ex. 3, R. 88, 89).

The Board found (R. 22) that the only purposes for which Miss Cheney was employed by petitioner and room 1521 subleased were the activities referred to earlier (see pages 5–6, *supra*). Miss Cheney testified (R. 76) and the Board found (R. 24) that petitioner's managing director used room 1521 when he was in the United States.

nullifying the phrase "office or place of business". But that result does not follow. A foreign corporation may have an office or place of business in the United States within the meaning of the regulations for the potential transaction of business without being "engaged in trade or business within the United States". See *Linen Thread Co.* v. *Commissioner, supra,* at 169. Here, however, the so-called office was not established for any such purpose, and it was within the discretion of the Treasury to frame its regulations so as to exclude such a place from the statutory concept of "office". Petitioner also seeks to invalidate the regulations as inconsistent with the statute by interpreting the statutory term "office," on the basis of legislative history, to mean any fixed place in the United States where a representative of the foreign corporation can be found for the purpose of effective revenue collection (Pet. 11–14). Petitioner points out (Pet. 11) that before 1936 all foreign corporations were taxed on their net income from sources within the United States. Tax was then withheld at the source of income in the case of corporations "not engaged in trade or business within the United States and not having any office or place of business therein". *E. g.,* section 144 of the Revenue Act of 1934. The 1936 revision consisted in taxing the latter class of nonresident foreign corporations on gross income rather than net income, in order to promote efficiency in income-tax col-

lection. See H. Rep. No. 2475, 74th Cong., 2d Sess., 10; S. Rep. No. 2156, 74th Cong., 2d Sess., 23. This history is clearly inadequate to support petitioner's inference concerning the meaning of the statutory term "office" since there is no indication that Congress by the 1936 change intended to alter the significance of the phrase employed to designate resident foreign corporations, which had been employed for a number of years in the withholding provisions dealing with foreign corporations. *E. g.,* section 145 of the Revenue Act of 1928; section 144 of the Revenue Acts of 1932 and 1934.

Petitioner's other contentions are equally without substance. The suggestion (Pet. 21–22) that the Board of Tax Appeals has subsequently receded from the position which it and the court below took in the present case and has embraced the argument here made by petitioner is altogether negatived by the later opinion of the Board and by the plainly different factual situation. See *B. W. Jones Trust,* 46 B. T. A. 531, 533–534, 537–538. Petitioner's assertion of conflict (Pet. 6) by the decision below with cases[*] holding that a corporation may have an office within a particular jurisdiction without being engaged in business there is unfounded, especially in view of the dis-

[*] *Green* v. *Chicago, B. & Q. Ry.*, 205 U. S. 530; *Toledo Rys. & Light Co.* v. *Hill*, 244 U. S. 49; *McCoach* v. *Minehill & Schuylkill Haven R. R.*, 228 U. S. 295.

similarity of the issues in those cases to the statutory tax question in the present case.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and presents no conflict. It is therefore respectfully submitted that the petition should be denied.

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